No. 95-294

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

COUNTY OF KERN and CARL SPARKS, Sheriff,

Petitioners,

v.

JERRY ANDERSON, GLENNA BLAIR, TERRY DAVID, JOHN WARDWELL, JESSE VASQUEZ and IRENE JUAREZ,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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Questions Presented

1. Did the court of appeals err when it applied deliberate indifference standards in passing on medical conditions of confinement of Kern County jail inmates?

2. Should the Supreme Court review findings that may create attorney fees liability for defendants, or consider whether plaintiff may secure fees for being the catalyst for a jail procedure change, before the district court and the court of appeals make a final decision as to the fee to be awarded, where the court of appeals has vacated the district court's fee award and remanded all fees issues to the district court for consideration in light of the court of appeals decision affirming in part, reversing in part, vacating in part and remanding in part the district court's order on the merits of the case?

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 45 F.3d 1310 (9th Cir. 1995). It is reprinted in the Petition as Appendix A. The decision was amended by addition of footnote, in an Order filed July 7, 1995, that is reprinted in the Petition as Appendix B. Each set of parties' Petition for Rehearing/Suggestion of Rehearing *en banc* was denied, by Orders reprinted in the Petition as Appendix C (May 19, 1995 Order denying Petitioners' Petition for Rehearing) and Petition Appendix B at B 3-4 (July 7, 1995 Order denying Respondents' Petition for Rehearing).

The district court filed an Order and Permanent Injunction on October 8, 1992. It is reprinted in the Petition as Appendix E. The Order and Permanent Injunction was based on the magistrate judge's Findings and Recommendations, filed March 20, 1992, which are reprinted in the Petition as Appendix D.

The district court also issued an attorneys' fees Order on January 28, 1994, which is reprinted in the Appendix hereto at App 1-2. The Petitioners appealed. The Notice of Appeal is reprinted in the Appendix hereto at App 3-4. The appeal was docketed in the Ninth Circuit separately from the appeal involved in the instant proceedings as Appeal No. 94-15414. At Petitioners' request, the Ninth Circuit vacated and remanded the district court's fee award for reconsideration. A copy of that Order filed May 22, 1995, is included in the Appendix hereto at App 5. Respondents' Motion to Vacate that Order was denied. A copy of that Order, filed June 28, 1995, is in the Appendix hereto at App 6.

The court of appeals also transferred Respondents' application for attorneys fees for appellate work to the district court. That Order, filed July 31, 1995, is included in the Appendix hereto at App 7. A copy of the court of appeal's Order, filed August 31, 1995, denying Petitioner's Motion to Vacate the July 31, 1995 Order is in the Appendix hereto at App 8.

JURISDICTION

The final judgment of the court of appeals was entered January 13, 1995, and amended on July 19, 1995. It is reprinted in the Petition as Appendix B at B 1-2. Petitioners' motion for rehearing was denied by an Order filed May 19, 1995, which is reprinted in the Petition as Appendix C. Respondents' Petition for Rehearing was denied by an Order filed July 7, 1995, which is reprinted in the Petition as Appendix B at B 3-4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983. Civil Action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R.S. § 1979; Dec. 29, 1979, P.L. 96-170; § 1, 93 Stat. 1284).

2. 42 U.S.C. § 1988(b). Proceeding in vindication of civil rights; attorneys' fees. In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, Title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
(As amended Nov. 21, 1991, P.L. 102-166, Title I, §§ 103-113(a), 105 Stat. 1074, 1079; Nov. 16, 1993, P.L. 103-141, § 4(a), 107 Stat. 1489, Sept. 13, 1993, P.L. 103-322, Title IV, Subtitle C, § 40303, 108 Stat. 1941.)

STATEMENT OF THE CASE

Introduction. This is a jail conditions case. Petitioners, who were defendants in the district court, are the County of Kern and Sheriff Carl Sparks. They operate a county jail facility that houses both pretrial detainees and sentenced prisoners. The Respondent inmates, who were plaintiffs in the district court, brought a class action under 42 U.S.C. § 1983, alleging numerous

unconstitutional jail conditions. Some issues were resolved by motion or stipulated settlement. The remainder of the case was tried by a magistrate judge who issued findings and recommendations. Petition Appendix D. The District Court modified and adopted these findings and recommendations, and issued a permanent injunction. Petition Appendix E. Both parties appealed.

The United States Court of Appeals for the Ninth Circuit affirmed in part and revised in part and remanded in part. 45 F.3d 1310, Petition Appendix A. *See also* Petition Appendix B at B 3-4 (July 7, 1995 Order modifying opinion).

Spanish Language Interpreters. One of many issues in the case was whether Petitioners were constitutionally required "to provide a Kern County employee, preferably a member of medical staff, to translate for Spanish speaking inmates who request a translator during medical and mental health interviews"? Petition Appendix A at A 11 (court of appeals Opinion); Appendix E at E 3 (district court Order). In addressing that issue, the Ninth Circuit applied this Court's deliberate indifference liability standard set forth in *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), to both the Eighth Amendment rights of convicted inmates and the Fourteenth Amendment rights of pretrial detainees, Petition Appendix A at A 11. It upheld the district court's decision, *see* Petition Appendix E at E 3 (Order) and Petition Appendix D at D 47-48 (Findings and Recommendations), ordering Petitioners to provide such interpreters. Petition Appendix A at A 11-12.

Dental and Vision Care. The magistrate judge made extensive findings about Petitioners' provision of dental and vision care. Petitioner Appendix D at D 13-21. He also expressly found that Petitioners had changed their prior policies; their new policies conformed to constitutional requirements; and there was no basis in the record for finding that Petitioners would fail to honor their new constitutional policies. Hence the magistrate judge recom-

mended that injunctive relief be denied. Petition Appendix D at D 16-18, 19-21. The district court agreed, Petition Appendix E at E 4; as did the court of appeals, Petitioner Appendix A at A 12-13.

On appeal (and here) Petitioners argued that the issue was not moot because the district court had "found that during the course of the proceedings the County had increased the level of services to constitutionally adequate standards," and made these findings "the basis for an award of attorneys fees as a 'catalyst' for change under 42 U.S.C. § 1988." Petitioner at 4. The Ninth Circuit, however, held that the "catalyst" issue "is not ripe", and "should be considered by the district court in the ancillary proceedings regarding attorneys' fees." Petition Appendix A at A 13.

Petitions for Rehearing/Suggestions of Rehearing *En Banc*. In the merits appeal that is the subject of the pending Petition for Writ of Certiorari, both Petitioners and Respondents petitioned the Ninth Circuit for Rehearing and Suggested Rehearing *en banc*.

Petitioners' Ninth Circuit Petition for Rehearing/Suggestion of Rehearing *en banc* addressed only issues concerning Spanish language interpreters. The Ninth Circuit denied that Petition. *See* Petition Appendix C.

The Respondents' Petition for Rehearing/ Suggestion of Rehearing *en banc* addressed the "deliberate indifference" standard of liability to be applied to the "safety cell" and "joint exercise" claims of pretrial detainees. *See* Petition Appendix A at A 3-11 (Ninth Circuit Opinion). After ordering Petitioners' to respond to Respondents' Petition for Rehearing, the court of appeals denied Respondents' Petition for Rehearing/Suggestion of Rehearing *en banc*. Petition Appendix B at B 3-4. The court of appeals, however, amended its Opinion as follows:

> The opinion filed January 13, 1995 is amended to include the following footnote at the end of the second paragraph of Section I, at page 505 of the slip opinion [*see* Petition Appendix A at A 3] and 45 F.3d 1310, 1313:
>
> > We need not decide here whether, under some circumstances, the "deliberate indifference" standards under the Eighth and Fourteenth Amendments diverge. *See Redman v. County of San Diego*, 942 F.2d 1435, 1442-43 (9th Cir. 1991) (*en banc*). The plaintiffs did not differentiate between the two standards in their briefs, and emphasized the Eighth Amendment formulation, which we apply in this opinion. We are convinced that any possible divergence would not have affected the outcome of our decision.

Petition Appendix B at B 3-4

Ancillary Fees Proceedings. There have been numerous ancillary fees proceedings in this case. First, in the district court the magistrate judge filed Findings and Recommendations on December 30, 1993, which were adopted by the district court in an Order filed January 28, 1994. Appendix hereto at App 1-2. Petitioners appealed on or about February 24, 1994. Appendix hereto at App 3-4. The appeal was docketed, separately from the instant appeal, in the United States Court of Appeals for the Ninth Circuit as No. 94-15414.

Subsequent fee proceedings occurred in the district court, pursuant to which the district court stayed enforcement, pending appeal, of the vast majority of the fees previously awarded. Findings and Recommendations were filed on January 17, 1995;

Amended Findings and Recommendations were filed on January 23, 1995 and the district court's order was filed on March 24, 1995.

The Petitioners here moved in the separate Ninth Circuit's fees appeal (No. 94-15414), that the court of appeals vacate the district court's January 28, 1994 original fees order (Appendix hereto at App 1-2) and remand the fees issues to the district court for reconsideration, in light of the Ninth Circuit's January 13, 1995 decision that is the subject of the instant Petition. On May 22, 1995, the Ninth Circuit granted Petitioners' Motion. Appendix hereto at App 5. Respondents' motion to set that Order aside was denied on June 28, 1995. Appendix hereto at App 6.

At Respondents' request, on July 31, 1995, the court of appeals also transferred to the district court Respondents' application for attorneys' fees for appellate work. Appendix hereto at App 7. On August 31, 1995, the court of appeals denied Petitioners' motion to vacate the July 31, 1995 transfer Order. Appendix hereto at App 8. On or about September 5, 1995, Respondents filed the transferred motion for appellate work fees in the district court.

REASONS FOR DENYING THE WRIT

Introduction

The Petition for Writ of Certiorari essentially is frivolous.

First, Petitioners ignore the actual findings made in the district court and the court of appeals, in order to argue without basis that the court of appeals failed correctly to apply this Court's teachings concerning Eighth Amendment rights of prisoners. In fact, the court of appeals applied this Court's Eighth Amendment deliberate indifference standard properly to affirm the district court's decision that Petitioners' failure to provide employee

Spanish interpreters for medical/mental health interviews to Spanish monolingual inmates on request, constituted knowing deliberate indifference to serious medical needs of such inmates. Contrary to Petitioners' assertion, there is no conflict here with this Court's controlling decisions or with decisions of other circuits.

Second, Petitioners ask this Court to review attorneys' fees issues that the court of appeals correctly held are unripe. Petitioners failed, moreover, to inform this Court that the court of appeals had in fact remanded the fees issues, which were the subject of a separate appeal, for consideration by the district court in light of the decision entered in the instant appeal.

1. There is no significant and recurring issue raised here as to whether the "deliberate indifference" standard is different for eighth and fourteenth amendment medical conditions claims brought by convicted prisoners and pre-trial detainees; nor is there any conflict among the circuits evident here.

Petitioners argue that the court of appeals decision below, concerning provision of Spanish language interpreters to prisoners in medical/mental health interviews, conflicts with this Court's decisions in *Wilson v. Seiter*, 501 U.S. 294 (1991) and *Farmer v. Brennan*, 511 U.S. ___, 128 L.Ed.2d 811 (1994), and conflicts with post-*Wilson* decisions of other circuits. Petition at 4-6. It does neither.

Contrary to Petitioners' implications, nothing in the Ninth Circuit's opinion even suggests that the correct standard for liability under the Fourteenth Amendment is less than rigorous, or is as relaxed as "mere negligence." *Compare* Petition at 5 *with* Petition Appendix A (Ninth Circuit opinion).

In this case, the court of appeals stated the liability standard as follows:

> Jail officials violate a prisoner's Eighth Amendment rights if they are deliberately indifferent to his serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (*same standard applies to pretrial detainees*). The indifference to medical needs must be substantial; a constitutional violation is not established by negligence or 'an inadvertent failure to provide adequate medical care.' *Estelle*, 429 U.S. at 105-06.

Appendix A to Petition at A-11 (emphasis added).

The court of appeals also held that the same standard of deliberate indifference to serious medical needs applies to both convicted and the pretrial inmates. Petition Appendix A at A 11, citing *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) for the proposition that the "same [Eighth Amendment deliberate indifference] standard applies to pretrial detainees." *See also* July 7, 1995 Order, Petition Appendix B at B 4 (stating that the court of appeal applied only the Eighth Amendment formulation in its opinion and that "we are convinced that any possible divergence [between Eighth and Fourteenth Amendment deliberate indifference standards] would not have affected the outcome of our decision.").

Petitioners contend that the court of appeals somehow improperly did not include within its analysis, "a deliberately indifferent state of mind" inquiry or analysis. *See* Petition at 4 and 5. In particular, Petitioners contend that the court of appeals ignored this Court's *Wilson* and *Farmer* decisions, under the Eighth Amendment, which they assert render cruel and unusual only those conditions of confinement that constitute "an objective

deprivation so serious as to rise to the level of a constitutional violation and a subjective 'deliberately indifferent' state of mind." Petition at 5.

However, based upon the record made in the district court, *e.g.*, Petition Appendix D at D 47-48, *compare id.* at D 21-47, the court of appeals properly rendered its decision on the basis of evidence that a failure to provide a staff interpreter can lead to serious medical problems and that through their policies and supervisory personnel Petitioners subjectively and obviously knew of this risk. Petition Appendix A at A 12; *id.* at A 12-13.

Petitioners are also entirely wrong in arguing that the Ninth Circuit's approach to the issue somehow is inconsistent with other circuits in applying "a state of mind requirement to Fourteenth Amendment challenges." Petition at 5. Indeed, as to the precise issue before it, the Ninth Circuit's opinion in the instant case relied upon and was totally consistent with the Seventh Circuit's decision in *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). *See* Petition Appendix A at A 12-13.

Petitioners' contentions amount to little more than a dispute with the court of appeals (and the district court) as to its application of the deliberate indifference standard to the specific facts in this case. That is not a matter appropriate for this Court's review. Resolution of factual disputes is the province of the district courts and courts of appeals. As this Court has stated:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co., 336 U.S. 271, 275 (1949). The "two-court rule" is fully applicable in this case. *See, Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

2. No issue pertaining to attorneys' fees in this case is ripe or otherwise suitable for review at this time by this Court.

At the Petitioners' request, the court of appeals vacated the district court's attorneys' fee award in this case and remanded it for reconsideration in light of the court of appeal' decision that is the subject of the instant Petition for Writ of Certiorari. Appendix hereto at App 5. The remand Order specifically states that the district court is to conduct "further proceedings consistent with *Anderson v. County of Kern*, 45 F.3d 1310 (9th Cir. 1995)[,]" Petition Appendix A at A 13. In fact, that decision specifically identifies for district court consideration the very issues that Petitioner contends should now be reviewed by this Court. *See* Appendix A at A 13.

Nothing in this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) even hints that this Court should review an attorneys' fee decision before it has been finally decided by a district court and reviewed by a court of appeals. *Compare* Petition at 7. Nothing in this Court's decision in *Farrar v. Hobby*, ___ U.S. ___, 121 L.Ed.2d 494 (1992) suggests such an extraordinary approach to review of attorneys' fees issues either.

Consistent with *Farrar*, in this case the Ninth Circuit, in its remand Orders (Petition Appendix A at A 13 and Appendix hereto at App 5), has provided the district court with direction and opportunity to award the appropriate attorneys' fee in light of "the degree of the plaintiff's overall success" in the litigation. *See*

Farrar, 121 L.Ed.2d at 505, quoting *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 793 (1989) and *Hensley*, 461 U.S. at 436.

Unlike the situation in *Farrar*, 121 L.Ed.2d at 506-511 (O'Connor, J concurring), Respondents' overall victory here certainly was neither pyrrhic nor *de minimus*. *Farrar* involved a purely damages case in which plaintiff who sought $17,000,000 secured $1 as nominal damages. By contrast with *Farrar*, the instant case is an injunctive and declaratory relief case in which Respondents have secured significant relief. Respondents believe their substantial success justifies a full fee, *see, e.g., Hensley*, 461 U.S. at 434-437. Initially, however, that will be for the district court to decide, subject to the Ninth Circuit's appellate oversight.

Contrary to Petitioners' assertion, Petition at 7-8, the Ninth Circuit's decision here also is not in conflict with the Fourth Circuit's *en banc* decision in *S-1 and S-2 v. State Board of Educ. of N.C.*, 21 F.3d 49 (4th Cir. 1994). *First*, the Ninth Circuit has vacated and remanded the fee award for reconsideration by the district court in light of the Ninth Circuit decision rendered here on the merits. Appendix hereto at App 5; *see also, S-1 and S-2*, 21 F.3d at 50-51 (describing the similar process that had brought the fees issue back before the Fourth Circuit). *Second*, unlike in *S-1 and S-2*, the instant appeal and case are not entirely moot as to a given party; only certain elements of the case and appeal are deemed moot due to Petitioners' current compliance with constitutional *minima*. Respondents secured substantial additional relief from Petitioners through settlement and judgment. *Third*, unlike in *S-1 and S-2*, the district court here actually found that at least Petitioners' prior vision care policy was constitutionally infirm. Petition Appendix D at D 21.

Suffice it to say, until an evidentiary record is made and considered in the district court, in light of the Ninth Circuit's

remand of fees issues, the attorneys' fees issues are not ripe for review by either the court of appeals or this Court.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Dated September 18, 1995

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